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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-531

ARKANSAS DEPARTMENT OF LABOR,
Petitioner,

v.

FAIRFIELD COMMUNITIES LAND COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an Arkansas statute which requires payment of premium pay for overtime work to female employees and not to male employees is invalid under the supremacy clause of the Constitution of the United States as a ban on sex discrimination in employment contained in Title VII of the Civil Rights Act of 1964 and other Federal law?

2. Whether the Arkansas statute in question is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Acts 1915, No. 191 of the Acts of Arkansas (Ark. Stats. Ann., § 81-601, et seq.), 42 U.S.C. §§ 2000e-2(a), 2000e-7 and 2000h-4, 29 U.S.C. § 206(d) (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2; Amendment No. XIV, Sec. 1.

STATEMENT OF THE CASE

On February 8, 1973, the Arkansas Department of Labor filed a civil action in the Pulaski County Arkansas Circuit Court against the Respondent, Fairfield Communities Land Company, seeking a total of $3,674.04 in unpaid wages for certain employees of the respondent. This case was presented to the lower court on stipulated facts.

The statutes which the respondent was alleged to have violated were Ark. Stats. Ann., § 81-601, et seq., and Ark. Stats. Ann., § 81-603, et seq. These statutes require that female employees be paid time and a half overtime for all hours worked over 8 in one day and on the seventh consecutive day in one week, and further require that permits be obtained from the Arkansas State Department of Labor permitting an employer to work a female in any regular overtime capacity in excess of one hour per day, and prior to permitting a female to work in a managerial capacity. *There is no similar requirement for men. The Arkansas law in question pertains only to women.*

In an Amended Answer, the respondent contended that the Arkansas statutes were invalid because they had been pre-

empted by Title VII of the Civil Rights Act of 1964, as amended, and also because the statutes in question were in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The lower court found the statutes in question to be unconstitutional and the Supreme Court of Arkansas affirmed.

The Arkansas Supreme Court declined to judicially redraft the Arkansas statutes in question so as to require extension to men of the benefits afforded by the statute only to female employees. The Arkansas Supreme Court held that to do so would be a usurpation of the legislative power.

ARGUMENT: REASONS FOR NOT GRANTING THE WRIT

I. There Is No Major Unresolved Conflict of Legal Authority Concerning the Validity of the Type of State Legislation Involved, and There Are No Momentous Legal Issues to Be Decided.

A. The Arkansas Supreme Court decision in this case is not in conflict with the Eighth Circuit decision.

The petitioner throughout the course of this litigation has failed to recognize the distinction between the case at bar and the case of *Potlatch Forest, Inc. v. Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), 46 F. 2d 1081 (8th Cir. 1972). Furthermore, the petitioner has consistently overemphasized the effect and importance of the *Potlatch* case. The import of the *Potlatch* case must be limited to the very narrow fact situation before the Federal District Court involved.

In the *Potlatch* case the employer *voluntarily* extended to men benefits afforded by the state statute only to women *conceding* that federal law required it to do so. The decision in the *Potlatch* case was founded upon the employer's concession.[1] It is

[1] The District Court in *Potlatch Forest, Inc. v. Hays*, supra, page 1374 noted:

> "The plaintiff (Potlatch) does not ask the court to adjudicate that the Civil Rights Act does not require the payment of daily overtime to men as long as such overtime is being paid to women: indeed plaintiff (Potlatch, the employer) *concedes* that such a requirement exists and in doing so takes the same position as does the EEOC."

And at page 1374, the court notes that the concession of the Potlatch Corporation was one that is subject to argument:

> "Whether the concession of Potlatch that under federal law it must pay daily overtime to male employees as long as it pays it to female employees is correct as an abstract proposition the court does not now decide. An argument to the contrary could be made that would be plausible at least. But the concession has been made presumably advisedly, and conforms to the view taken by the EEOC and the court will accept it for the purpose of this case."

important that the court in the *Potlatch* case accepted this concession of the employer only for the purpose of that particular case, *Potlatch Forest, Inc. v. Hays*, supra, 1374; thus emphasizing the narrow scope of the decision involved.

Since the court in *Potlatch Forest, Inc. v. Hays*, did not decide the question of whether an employer is required by federal law to extend female benefits to men, it did not have to consider the propriety of "judicial legislation." All parties in the *Potlatch* case, including the employer, conceded that the Congress of the United States had enacted the necessary legislation to alleviate the conflict.

In regard to the Eighth Circuit decision in the *Potlatch* case, it should be noted that this court did not consider the issue of whether the overtime laws before it were intended to limit the hours women could work, thereby resulting in a discrimination against women. *Hays v. Potlatch Forest, Inc.*, 465 F. 2d 1082. The reason stated for this was that the question had not been raised below. Here, however, the argument has been raised, and indeed greatly emphasized.

The Arkansas Supreme Court in its decision in the case at bar noted that the courts in the *Potlatch* case did not properly consider the purpose and effect of the Arkansas statutes, recognizing that the Eighth Circuit Court of Appeals treated the Arkansas statute as a wage and hour law having as its sole purpose the payment of female employees at time and a half overtime. *State of Arkansas v. Fairfield Communities Land Company*, 538 S. W. 2d 698, 699. The Arkansas Supreme Court correctly pointed out that neither of the Federal Court opinions mentioned other aspects of the Arkansas law which it considered

to be of controlling weight. *State of Arkansas v. Fairfield Communities Land Company*, supra, 699. The court was referring here to requirements of the law which compel an employer to obtain a permit from the Department of Labor before employing a woman in an overtime capacity, and other restrictive provisions of the Arkansas law. These provisions clearly make the Arkansas law in question a protective law which discourages employment and denies women employment opportunities. Even the petitioner in its Petition for Writ of Certiorari notes that statutes which expressly, or in effect, deny women employment opportunities are not beneficial and by virtue of Title VII are invalid.[2]

B. **There is no "real and embarrassing conflict" as is required for issuance of this writ. Layne and Company v. Western Well Works**, 261 U. S. 387, 393, 43 S. Ct. 422, 423 (1923).

The respondent submits that there is no conflict at all between the Ninth Circuit and Eighth Circuit decisions. First, the *Potlatch* case is easily distinguished on the facts, and secondly, the Arkansas Supreme Court in this case has completely negated any supposed conflict between the Eighth Circuit and Ninth Circuit by virtue of its pronouncement as to the impropriety of extending the benefits of the Arkansas statute.

In the Ninth Circuit case of *Homemakers, Inc. v. Division of Industrial Welfare of the State of California*, 356 F. Supp. 1111 (1973), 509 F. 2d 20 (9th Cir. 1974), the Ninth Circuit determined that it would be a usurpation of the legislative power for the court to require extension of the benefits afforded by the California statute to men. In that case the employer did not make the concession referred to above, and further contended that the statutes in question discouraged employment and dis-

[2] See footnote 5 of page 4 of the petitioner's Petition for Writ of Certiorari.

criminated against women. Neither of these elements were present in the *Potlatch* case. Both of these elements are present in the case at bar, and again consistently with the *Homemakers* case the Arkansas Supreme Court has determined that extension of benefits afforded by the *state statute* would be a usurpation of the legislative function.

C. **The controlling question involved is essentially a question of state law and the pronouncement of the Arkansas Supreme Court in regard to this question of state law eliminates any precedent value of Potlatch Forest, Inc., v. Hays, or Hays v. Potlatch Forest, Inc.**

Even if the case of *Hays v. Potlatch Forest, Inc.*, might be considered inconsistent with the decision of the Arkansas Supreme Court the essential question involved is one of state law which should properly be determined by the State Supreme Court. It is certainly within the province of the Arkansas Supreme Court and not the Federal Courts to determine whether the requirements of an Arkansas statute should be extended to men. This is a question of a state court's determination of state law, and if the state court determines that extension of benefits is a usurpation of the legislative function, then the Federal Court must be bound by the state court's ruling. The state court in the case at bar is in effect stating that consistency between the state law and the federal law may not be supplied by judicial extension of benefits afforded by the state statute. Surely, it is not within the province of a Federal Court to "amend" the provisions of a state law to obviate a conflict with federal law. *Doctors Hospital, Inc. v. Recio*, 383 F. Supp. 409, 417 (1974).

D. **This court should deny the writ because there are no momentous legal issues presented in this case.**

A review of recent decisions regarding the supposed "extension of benefits rule" demonstrates that the Arkansas Supreme

Court in effectively negating the precedential value of the *Potlatch* decision has done away with the last vestige of supposed adherence to this cumbersome theory as a means of validating state protective legislation. There is an overwhelming tide of judicial precedent throughout the nation invalidating state protective legislation which provides benefits to women not afforded to men, and confirming that such legislation is inconsistent with Title VII of the Civil Rights Act and in violation of the Equal Protection Clause.[3] There is in actuality no viable authority confirming the petitioner's position. The respondent submits that the petitioner has failed to cite any decision accepting the contrived "extension of benefits" theory supposedly advanced by the *Potlatch* court.

E. **The decision of the Arkansas Supreme Court certainly should not be set aside because it is in conflict with regulations of the Equal Employment Opportunity Commission.**

Very little needs to be said about this contention except that the authorization given to the Equal Employment Opportunity Commission by Congress is to issue procedural regulations. This authority and the regulations issued in accordance therewith certainly does not have the force of law. Such authority does not include the power to issue regulations which would affect substantive state law. *Homemakers, Inc., v. Division of Industrial Welfare of the State of California*, supra, 1113,22.

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[3] See the recent case of *Doctors Hospital, Inc. v. Recio*, 383 F. Supp. 409 (1974), which provides an exhaustive treatment of this subject and cites numerous cases including Attorney General opinions that have held state protective statutes to be invalid as being in conflict with Title VII.

F. **In passing the Civil Rights Act of 1964 Congress intended to pre-empt those state laws that are inconsistent with any purpose of the act or any provision thereof.**

It has been noted that the purpose afforded to U.S.C.A., Sec. 2000e-7 and 2000h-4 (the Congressional Declaration of Non-Pre-Emptive Intent) was essentially to assure preservation of state anti-discrimination laws and not to save inconsistent laws. *Rosenfeld v. Southern Pacific Railroad Company*, 293 F. Supp. 1219, 1226. It has further been pointed out that Title VII's anti-pre-emption provision was added to the Act before sex was added as a forbidden category for discrimination. The provision clearly was intended to preserve intact State Fair Employment Practice laws. Volume 84 *Harvard Law Review* 1109, 1191.

The petitioner, however, is correct in stating that "the best test of what congress intended is what Congress said."[4] In examining the *language* in the pre-emption disclaimers contained in the Civil Rights Act (42 U.S.C. §2000e-7 and §2000h-4), it should be noted:

2000e-7:

> "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any state or political subdivision of a state, *other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.*"

Similarly, 2000h-4:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to

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[4] Page 9 of petitioner's Petition for Writ of Certiorari.

> occupy the field in which any such title operates to the exclusion of state laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of state law, *unless such provision is inconsistent with any act or the purpose of this Act, or any provision thereof.*"

In examining what Congress has *said*, therefore, it is plain and obvious that the Arkansas statute involved is squarely and hopelessly in conflict with the Civil Rights Act of 1964 which expressly prohibits discrimination based on sex.

Petitioner has never argued that Title VII and the Arkansas statutes involved are consistent. The obvious reason is because of the absolute inconsistency. However, from the petitioner's quotation of Congressman McCulloch[5] it is obvious that the petitioner fails to recognize that the Arkansas statute is discriminatory and discourages the employment of women. As is clearly reflected in the Arkansas Supreme Court's decision, the earlier Arkansas Supreme Court decision of *State v. Crow*, 130 Ark. 272, 197 S.W. 4 (1917), and even in the *Potlatch* case, this was clearly the purpose of the statute—to discourage female employment. The statute, if not invalidated, therefore, will certainly grant and insure lesser rights than those required by the Civil Rights Act of 1964.

G. **The Equal Pay Act cannot be used to perpetuate women's protective laws.**

It should be noted at the outset that there *has* been a judicial determination that the Equal Pay Act does not require the extension to men of overtime benefits afforded to women by state protective statutes. *Homemaker v. Division of Industrial*

[5] Page 11 of the Petition for Writ of Certiorari.

Welfare, supra. However, the petitioner insists that these laws may be saved despite their otherwise clear and irreconcilable conflict with the Civil Rights Act, through a judicial revision of startling scope and consequence. This, the Arkansas Supreme Court refused to do.

The "extension of benefits" theory, which petitioner believes should be followed to accomplish this turnabout, cannot be properly utilized where its consequence, as here, is not only to ignore, but indeed, to reverse the undoubted intent of the Arkansas Legislature.

The inappropriateness of rewriting the Arkansas law was clear to the Court below, and a reiteration of the arguments involved before the Arkansas Supreme Court would necessarily involve a detailed reargument of the merits. The respondent will not attempt to do this, but will briefly respond to the new emphasis being placed upon the Equal Pay Act by the petitioner in its Petition for Certiorari.

The new emphasis upon the Equal Pay Act by the petitioner involves the relationship between the Equal Pay Act and Title VII of the Civil Rights Act. The petitioner notes in its brief as follows:[6]

> "The substantive section of the Equal Pay Act of 1963 includes a proviso: 'An employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.' 29 U.S.C. § 206 (d)(1)."

The petitioner would read the language quoted above into Title VII of the Civil Right Act of 1964, and contends that "There are substantial reasons to conclude that Title VII must

[6] Page 11 of the Petition for Writ of Certiorari.

be read in the light of this condition." The petitioner then attempts to establish Congress' intent not to lower wages of female employees as a consquence of remedying sex discrimination in employment by citing various statements of members of Congress taken from the Congressional Record. Again, the respondent submits that Congress has stated in plain, unambiguous language that provisions of a state law which are "inconsistent" with the provisions of Title VII of the Civil Rights Act of 1964 are invalid, and that they are not saved by the pre-emption disclaimers in Section 2000e-7 and 2000h-4 of said Act. Neither the opinions of the various members of Congress cited by petitioner, nor the cases cited by petitioner in this respect, bear directly upon the so-called "Extension of Benefits" doctrine. As a matter of fact, both the case of *Shultz v. Wheaton Glass Co.*, 421 F. 2d 259, 266; and the case of *Orr v. Frank R. MacNeill & Sons, Inc.*, 511 F. 2d 166, 170, cited by petitioner for the proposition that the "Extension of Benefits" doctrine *must* be read into Title VII of the Civil Rights Act of 1964, deal with *job classification* problems under the wage and hour provisions of the Fair Labor Standards Act of 1938. The intent of Congress was to pre-empt and invalidate provisions of state law "inconsistent" with the provisions of Title VII of the Civil Rights Act of 1964. Having failed to convince the Arkansas Supreme Court that it should rewrite the Arkansas statutes so as to judicially legislate the same benefits for men as were offered to women under the Arkansas Women's Protection Law, the petitioner would now have this Court change what Congress wrote so that no conflict would exist between Title VII of the Civil Rights Act of 1964 and the Arkansas women's protection statutes.

Another answer to petitioner's argument in this respect is that the respondent in this case *has not paid a wage rate differential*. Had the respondent been paying the wage rate differential, this law suit would have never been brought. There has never been an assertion in this case that there has been a

violation of the Equal Pay Act. Consequently, the Equal Pay Act is not relevant to the questions presented by this case.

Further, Petitioner's argument that the Equal Pay Act may be interpreted and read together with Title VII to provide consistency between Title VII and the state laws in question, treats as discriminatory only the premium payment aspect of the Arkansas Statutes. The Arkansas Statutes involved, however, are protective laws which were intended to discourage and regulate female employment. There is a second phase, therefore, of the Arkansas Statutes which is discriminatory also. There are provisions which require the employer to apply to the State Department of Labor prior to working a female in an overtime capacity.[7] This permit requirement places an additional burden on an employer and would certainly discourage an employer from hiring an equally qualified female job applicant. This is a requirement that the Arkansas Supreme Court noted to be inseparable from the remainder of the Act in question. *State of Arkansas v. Fairfield Communities Land Company*, supra, 700. Its determination in regard to the severability of this provision must be regarded as controlling as a matter of State law to be properly determined by the State Supreme Court. There is no

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[7] Ark. Stats. Ann., 81-601 provides pertinently as follows:

"No female shall be employed in this state in any manufacturing, mechanical or mercantile establishment, laundry, or by an express or transportation company, or by any hotel, restaurant, or eating place, or any building and loan association, insurance company, or by any establishment engaged in finance or credit business, or by any person, persons, partnership, or corporation whatsoever in any capacity except in those occupations that are expressly exempted by law, for more than eight (8) hours in any one day or more than six (6) consecutive days in any one (1) week, unless such female employee receives compensation for her employment in excess of the hours above specified at the rate of not less than one and one half times the regular rate at which she is employed, *and that a permit be secured from the Commissioner of Labor for any overtime of a permanent nature in excess of one hour a day.*"

mandate in the Equal Pay Act which may be used as a basis of negating the onerous and discriminatory effect of the permit provision.

II. CONCLUSION

There are no momentous issues presented in this case. As noted above, the law regarding the questions presented here has in recent years become firmly established. In keeping with the spirit of the Equal Rights Movement for Women, women's protective laws have been consistently declared unconstitutional. Although again the respondent emphasizes that the *Potlatch* case does not actually stand for extension of benefits, it is further submitted that the Arkansas State Supreme Court decision in this case lays to rest the last vestige of any supposed endorsement of this contrived theory.

The Arkansas Supreme Court decision points out very clearly that the obvious intention of the Legislature in enacting the law in question was to protect the health and welfare of women. It was not to create a wage and hours law. The petitioners would have this court require the Arkansas Supreme Court to redraft Arkansas law in such a way as to create an entirely new class of beneficiaries and to completely eliminate the legislative purpose of the law. The extent to which the Arkansas legislation should be re-drafted is clearly a determination that should be made by the Arkansas State Supreme Court.

Furthermore, the argument of the petitioner attempts to leave the impression that the Arkansas State Supreme Court decision eliminates the payment of adequate wages to women. This is simply not true. Many arrangements for such premium pay are based upon private agreement of employer and employee without the intervention of governmental mandate. Others result from collective bargaining agreements. Most importantly, however,

premium pay for overtime work is required by the Fair Labor Standards Act which prescribes payment at the rate of time and a half for work in excess of 40 hours per week.

The denial of the Petition for Writ of Certiorari will leave male and female employees in the State of Arkansas to be treated equally with respect to overtime, and there will be no reason either by virtue of the additional payment required or by virtue of the permit requirement for an employer to discriminate against a woman when considering her in an employment opportunity situation.

Respectfully submitted,

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